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No. 84-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEVELAND,

Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In a suit claiming a violation of Section 2 of the Sherman Act against a single defendant is it an abuse of discretion for the trial judge to refuse to give collateral estoppel effect to findings of a hearing panel of an administrative agency in a proceeding (a) under a different statute, (b) involving claims of conspiracy by five companies (including the Respondent), (c) which findings were in conflict with those of another administrative agency, and (d) where it was uncertain which findings were the basis of the decision by the appellate panel of the agency?

2. Was it an abuse of discretion for the trial court in a Sherman Act Section 2 case to refuse to admit evidence of activity, which under the "Noerr-Pennington" doctrine could not form the basis for antitrust liability, where he found that such evidence on the question of intent was of "diminished probative value" which did not "outweigh their likely prejudicial effect."

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BRIEF IN OPPOSITION OF RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

COUNTER-STATEMENT OF THE CASE

Petitioner, the City of Cleveland, through its Utility Department (Muny Light), is in direct house-to-house competition with Respondent, the Cleveland Electric Illuminating Company (CEI),[1] in the sale of electric energy at retail in a portion (about 30 square miles containing about 20 percent of Cleveland electric customers) of the City of Cleveland, Ohio and its environs. The Respondent provides electric service at retail throughout a 1700 square mile area of northeastern Ohio, except in Painesville, a small city about 35 miles east of Cleveland. The City claimed that CEI monopolized or

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[1] In accordance with Rule 28.1 of the Rules of the this Court, Respondent states that it has no parent company, subsidiary (other than wholly owned subsidiary) or corporate affiliate.

attempted to monopolize the wholesale market and the retail market for electric power in a "substantial portion" of northeastern Ohio in violation of Section 2 of the Sherman Act by certain specific acts or refusals to act.[2]

The City alleged that as a consequence of CEI's acts, Muny Light lost customers, was forced out of the generation business, and was denied access to cheap power sources. The defense was: (1) that the condition of Muny Light and its losses were the proximate result of the City's mismanagement and neglect, rather than any act or omission by CEI; and (2) that in any event the acts complained of were normal competitive activity and no duty rested on CEI to rescue its competitor, Muny Light, from bankruptcy.

Underlying all of the claims in the case is the issue of whether CEI had a duty to aid its competitor. At the time the original complaint was filed, Muny Light was bankrupt. It would have been out of business had it been a private enterprise. It had operated at a loss every year since 1969 and survived only by reason of massive infusions of cash from the general funds of the City, which by the close of evidence in the case amounted to $34 million.

There is no reported antitrust case which embodies in any relevant degree the fact situation here involved. Out of some 2100 places where municipal electric systems ex-

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[2] The action originally was filed against CEI and four other electric utilities which had entered into certain mutually advantageous planning, construction and operating agreements, dealing in part with the construction, ownership, and operation of nuclear generating stations, which organization was called CAPCO. The original complaint alleged a conspiracy in violation of Sections 1 and 2 of the Sherman Act to restrain commerce in electric power in northeastern Ohio and western Pennsylvania. Shortly before the first trial, the City settled with the defendants other than CEI. The City thereafter filed a second amended complaint, which abandoned all claims under Section 1 and of conspiracy. It alleged only monopolization and attempted monopolization by CEI of the electric business in a portion of northeastern Ohio in violation of Section 2.

ist, there are only two where direct and active competition in the retail distribution of electric energy now exists: Bay City, Michigan and Cleveland, Ohio. As even the City's expert conceded, the retail distribution of electric energy is ordinarily regarded as a natural monopoly and, long-range, active competition is not economically sustainable. The City's basic complaint was that CEI failed to provide help to enable the City better to compete with CEI. In the competitive struggle, historically Muny Light had lower rates and CEI had better service. We argued in the courts below and, if certiorari is granted, our contention in this Court will be that, as a matter of law, in a natural monopoly situation Section 2 of the Sherman Act does not require CEI to contribute to the impairment of its own business by helping its tax-subsidized competitor to cure its operating deficiencies.

In any event, we submit that this is not a case for this Court to grant certiorari. Each of the issues raised in the Petition involves the exercise of discretion by the District Court, and the only question is whether the District Court abused that discretion. With respect to both questions presented, the District Court made considered decisions in lengthy memoranda, using principles in accord with the decisions of this Court. There is no question of law involved. There is no conflict among the circuits. There is no conflict with the decisions of this Court.

REASONS FOR DENYING THE WRIT

A. The Decisions Below Are Wholly Consistent With The Decisions Of This Court With Respect To Collateral Estoppel.

The proceeding before a Nuclear Regulatory Commission (NRC) Licensing Board, the findings of which Petitioner claims should have been given collateral estoppel effect, arose out of applications by five public utilities, including Respondent, for licenses to construct certain nuclear power plants. Based upon complaints by the City of Cleveland, the Assistant Attorney General of the Anti-

trust Division advised the NRC to hold an "antitrust hearing" on the application for nuclear licenses. Under the provisions of 42 U.S.C. § 2135(c)(5) (1976), this required the NRC to hold hearings and to determine whether activities under the proposed licenses would "create or maintain a situation inconsistent with the antitrust laws." A Licensing Board (the *nisi prius* hearing agency of the Commission) held extended hearings after which it found that the five companies, including Respondent, had engaged in practices inconsistent with the antitrust laws. The panel recommended approving the applications for nuclear licenses, but attaching certain conditions thereto. This decision was appealed to an Appeal Board whose decision became the final order of the Commission.

The Licensing Board made 222 separate findings of fact, many with several sub-parts. The Appeal Board affirmed, with modifications, the order of the Licensing Board but as to the facts said only that it concurred in the "ultimate factual and legal conclusions" of a draft opinion of a member of the Appeal Board who resigned prior to the Appeal Board's decision. In its brief in the Court of Appeals, the Petitioner specifically complained about a failure to apply collateral estoppel to only six of the 222 Licensing Board findings. The City asserts in its Petition that the Appeal Board "affirmed, with modifications, the Licensing Board's Initial Decision (antitrust), and in so doing resolved the overwhelming majority of the factual issues in the identical way the Licensing Board had." (Petition at 3). This is simply not so, and if we may say so, the Petitioner is something less than frank in elucidating the circumstances bearing upon the decisions of the courts below relative to collateral estoppel.

1. The NRC Appeal Board consisted of three persons. The member who was assigned to write the opinion resigned from the Appeal Board shortly after completing

his draft of an opinion. The two remaining members, who made the decision, stated as follows at the very outset of the Appeal Board decision:

> "Shortly after completing his opinion, however, our colleague resigned from the Appeal Panel to enter private law practice in another city. It was impossible for us to complete our own review of Mr. Sharfman's lengthy decision before his departure. And since that time, considerations of avoiding even the appearance of a conflict of interest situation have served to preclude our discussing with him any aspect of this proceeding.
>
> Had Mr. Sharfman remained a member of this Board, or continued to be available for consultation, we might well have suggested revisions in his treatment of certain issues and have endeavored in other respects to persuade him of the correctness of our views (particularly on the question of relief) to the extent that they do not coincide with his. Those options have not been open to us. In the circumstances, we file his opinion as it was presented to us (pp. 65*ff.*, *infra.*). We concur in its ultimate factual and legal conclusions and the result it reaches except where indicated in our separate opinion, which follows immediately." (ALAB-560 p. 3. Tab 3 of Volume I of Petitioner's filed Appendix.)

Given the treatment by the Appeal Board quoted above, it is impossible to know not only what facts were necessary to the decision of the Appeal Board, but more basically, what facts the Appeal Board actually found or approved, specifically or otherwise. All the Appeal Board said in this respect was that it concurred in the "ultimate factual and legal conclusions." Of course, the ultimate conclusion was that the issuance of the license would "create or maintain a situation inconsistent with the antitrust laws" unless specified conditions were placed thereon. But this ultimate finding is of no collateral estoppel use to the Petitioner.

The Petitioner makes no reference to the confusing proceedings before the Appeal Board nor the difficulties created thereby. This ignores one of the important reasons articulated by the District Court in its determination not to give collateral estoppel effect to the findings of the Licensing Board. (See Petition at A39.) There is simply no way to tell what specific factual findings were regarded by the Appeal Board as necessary to the outcome of the proceeding. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

2. The legal standard applicable to the NRC proceeding is substantially different from Section 2 of the Sherman Act. Under 42 U.S.C. § 2135(c)(5), the Commission is required to:

> ". . . make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."

Not only do the substantive standards differ substantially from those applicable in a Sherman Act Section 2 case,[3] but there were certain important procedural differences. For example, the Licensing Board refused to give any effect to the *Noerr-Pennington* doctrine, an important matter here, because, it said, one is not entitled to a government license as a matter of right. The Board was not bound by any statute of limitations whereas the Clayton Act statute of four years applies here. Moreover, the proceeding before the NRC Licensing Board was a

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[3] The Licensing and Appeals Board of the NRC have recognized this difference in legal standard, and consequently held that they will *not* give collateral estoppel effect to a judgment of a United States District Court which found no violation of the antitrust laws. *In the Matter of Houston Lighting and Power Co., et al.*, 10 NRC 563 (1979), *aff'd by Appeal Board*, 11 NRC 14 (1980). See also, *Alabama Power Co. v. Nuclear Regulatory Commission*, 692 F.2d 1362, 1367-69 (11th Cir. 1982), *cert. denied*, 102 S. Ct. 72 (1983), and A63-66.

conspiracy case[4] involving alleged restraints on the electric business in northeastern Ohio and western Pennsylvania—a much broader inquiry—and the conspiracy claim had an important bearing on the admissibility of evidence of the conduct of alleged co-conspirators. These procedural differences alone are an adequate basis for the denial of collateral estoppel. *Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331.[5]

3. Proceedings before a Federal Power Commission administrative law judge involving only the City and CEI resulted in a finding that the City's claim that its difficulties in maintaining service to its customers were due in whole or part to CEI's anti-competitive practices was not supported by the record. The ALJ found expressly that the City's inability to furnish reliable, dependable service was due primarily to incompetent management and inefficient operations—precisely the claim we made in the courts below. This finding was affirmed by the Federal Power Commission and not appealed by the City.[6]

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[4] There is no doubt that both the Licensing and the Appeal Board perceived the fundamental issue to be whether *joint* conduct inconsistent with the antitrust laws had occurred or would occur if a license were granted. *See In re Toledo Edison Co. and Cleveland Electric Illuminating Co.,* 10 N.R.C. 265, 277 (1979).

[5] In fact, three of the four factors that this Court in *Parklane Hosiery* directed a District Court to consider in determining whether, in its discretion, to apply collateral estoppel in a non-mutual setting also appropriately are considered where mutuality of the parties exists: whether a defendant had little incentive to litigate the first action, whether the judgment relied upon for estoppel might be inconsistent with one or more previous judgments in favor of defendant, and whether the second action affords defendants procedural opportunities unavailable in the first action. *See, e.g., Parklane Hosiery v. Shore, supra,* 439 U.S. at 330-331 n. 15; *The Evergreens v. Nunan,* 141 F.2d 927 (2d Cir. 1944); and *Tipler v. E.I. Du Pont de Nemours and Co.,* 443 F.2d 125, 128-29 (6th Cir. 1971).

[6] *City of Cleveland v. Cleveland Electric Illuminating Co.,* 49 F.P.C. 118 (1973), *reh'g denied,* 49 F.P.C. 631 (1973), *aff'd in all relevant respects,* 525 F.2d 845 (D.C. Cir. 1976).

The District Court was thus presented with conflicting findings of fact by two administrative agencies and in these circumstances held that collateral estoppel should be applied to neither. (See memorandum and order, February 15, 1978 (Petition, A47 at A52; 538 F. Supp. at 1232)).

4. The original complaint alleged a conspiracy among five defendants. As noted above, the complaint was amended (a) to eliminate all claims of conspiracy or of restraint of trade in a broad area of northeastern Ohio and western Pennsylvania and (b) to state a claim, against CEI alone, of monopolization or attempted monopolization in a limited area of the City of Cleveland and its environs.

The City filed with its Petition, as Volume 2 of its Appendix, a copy of the elaborate appendix which accompanied its motion in the trial court for an order giving collateral estoppel effect to the findings of the NRC Licensing Board. Petitioner, after inviting this Court's attention to this appendix, states that the City was compelled "to relitigate identical factual issues in the District Court which had been finally resolved previously by the NRC." (Petition at 4-5). If the City is suggesting that the issues referred to there are the ones it was "compelled to relitigate," this is simply not so. The statement in the Court of Appeals brief and the materials contained in Volume 2 of the record are the only times the Petitioner was specific about the findings for which it claimed collateral estoppel. In Volume 2 of the Appendix, the City claimed that 206 of the 222 findings of fact made by the NRC Licensing Board tracked specific paragraphs of its complaint. However, this motion was filed October 26, 1979, and the complaint referred to therein was the original complaint, alleging a conspiracy among five defendants to violate Sections 1 and 2 of the Sherman Act in a wide geographic area. However, thereafter the Petitioner amended its complaint, and, as noted

above, eliminated all conspiracy claims, all defendants except CEI and greatly restricted the area of alleged anti-competitive conduct. The Petitioner thereafter never modified its motion to take into account the "findings" that were no longer germane. We have made no attempt to go through the nearly 100 pages of Volume 2 to ascertain how many of the items which were claimed for collateral estoppel under the original complaint would be arguably applicable to the second amended complaint. However, the City complained of only six items in its brief in the Court of Appeals.

It is true that collateral estoppel may apply to final decisions of administrative agencies, *e.g., United States v. Utah Construction Co.*, 384 U.S. 394 (1966), but it is applied more selectively in the administrative context.[7] The District Court's rationale, approved by the Court of Appeals, is fully set out in its memorandum and order of February 15, 1978 (cited above).

The District Court properly exercised its discretion[8] and the Court of Appeals properly approved the trial

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[7] *Tipler v. E. I. DuPont de Nemours & Co., supra*, 443 F.2d at 128; *Artukovic v. Immigration & Naturalization Service*, 693 F.2d 894, 898 (9th Cir. 1982) ("in the administrative law context, the principles of collateral estoppel and res judicata are applied flexibly"); *United States v. Lasky*, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979) (collateral estoppel is "not to be applied to administrative decisions with the same rigidity as their judicial counterpart. . . . [T]he need to proceed cautiously in this area is acute, and due regard must be given in each case as to whether the application of the doctrine is appropriate in light of the particular prior administrative proceeding"); *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973); *Old Dutch Farms, Inc. v. Milk Driver Local 584*, 281 F. Supp. 971, 974 (E.D. N.Y. 1968).

[8] Contrary to Petitioner's suggestion (Petition at 12), the application of collateral estoppel, being an equitable doctrine, always contains an element of discretion. *See, e.g., Alexander Hospital, Inc. v. United States*, 5 Ct. Cl. 62, 69 (1984) ("collateral estoppel is an equitable doctrine; it should not be applied when it would be

court's conclusion. There is no conflict among the circuits. There is no failure to follow the decisions of this court. We do not understand Petitioner's suggestion that the Court of Appeals is at fault for its failure to refer to *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984) and *United States v. Mendoza*, 104 S. Ct. 568 (1984). They involved only the applicability of collateral estoppel against the United States. They announced no innovation or change in the law of collateral estoppel in actions between private parties.

B. The Decision Below Affirming The Exclusion Of Certain Stipulations Is In Accordance With The Principles Enunciated By This Court.

The Petitioner (Petition at 22-23) engages in what we perceive to be a confusing and largely semantic discussion of whether the District Court "inverted" a "balancing test" in deciding whether to permit the use of the so-called Miller stipulations as evidence of intent. This is a non-issue. First, the District Court explicitly applied the evidentiary standard mandated by *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965). In one of its several orders in this case respecting the exclusion of the Miller stipulations (Petition at A105), the District Court disposed of a renewed motion to admit those stipulations based upon the reasoning of a then recently decided case, *Lansdale v. Philadel-*

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unjust," *citing, inter alia, Parklane*); *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983) (collateral estoppel "is an equitable doctrine and its application, considered in light of fairness to both parties, rests within the broad discretion of the lower court"); *Tipler v. E. I. DuPont de Nemours & Co., supra*, 443 F.2d at 128 ("Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice"); *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 454 (D.D.C. 1978).

phia Electric Co., 517 F. Supp. 218, 223 (E.D. Pa. 1981). The District Court stated (Petition at A108):

> ". . . . the Pennsylvania District judge reiterated the test employed by this Court, and explicitly pronounced by the Supreme Court in *Pennington*, namely that it is within the discretion of the trial judge to admit the evidence upon the issue of intent 'if he deems it probative and not unduly prejudicial'. 381 U.S. at 670 n. 3;
>
> This court has consistently applied the above test in the instant matter and *Lansdale* is in no respect inconsistent with this principle." (Italics added).

Second, the District court explicitly considered both the probative value and the prejudicial effect of the Miller stipulations in his first order on the subject, September 19, 1980 (A85-A87) (see also, the Order of May 18, 1981, at A101).

The plain fact is that the District Court decided that although the Miller stipulations indeed had some probative value, though he found it to be limited, the admission of the stipulations would be "unduly prejudicial." This is exactly the task delegated to a trial court by this Court in *United Mine Workers v. Pennington*, *supra*, 381 U.S. at 670 n. 3. We do not believe that the question whether the District Court abused its discretion in this regard is a proper question on which to issue a writ of certiorari here.

Petitioner claims (Petition at 19) that the District Court in fact departed from the test laid down by this Court in *Pennington* by giving undue weight to First Amendment concerns. In purported support, it quotes from three different orders of the District Court: July 30, 1981 (A104); August 3, 1981 (A105); and August 17, 1981 (A119). Those quotations are taken out of context.

The July 30, 1981 Order concerned a claim by Petitioner that because the Miller stipulations had been admitted into evidence in the first trial and thus had become "a matter of public record", the First Amendment considerations upon which the *Noerr-Pennington* doctrine is based no longer existed and any *Noerr-Pennington* considerations were an irrelevancy. To this rather surprising contention, the District Court responded that the City failed to comprehend that under *Noerr-Pennington* undue prejudice to an antitrust defendant results not from the mere public disclosure, but rather from the fact that protected activity is likely to be used by the jury as a "legally inappropriate basis for liability. . . ." (A104). This is, of course, a perfectly correct statement of hornbook law.[9] But contrary to Petitioner's suggestion, the District Court did not simply rely upon the inherent danger of prejudice in admitting the Miller stipulations. As pointed out above, the District Court explicitly considered the probative value of the proffered evidence, and found it to be outweighed by the potential prejudicial effect. (A85-A87). The August 3, 1981 quotation (A105) was simply a statement by the District Court of an overall purpose of the *Noerr-Pennington* doctrine, *i.e.*, to protect against any chilling effect upon the exercise of First Amendment rights. The August 17, 1981 Order dealt with the question of whether counsel for Petitioner could "trigger" the admission of the Miller stipulations simply by undertaking a course of cross-examination of Respondent's witnesses designed solely to require the witness either to mention the *Noerr-Pennington* protected conduct or commit perjury.[10] The District Court held that permitting

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[9] For example, the Advisory Committee Note to Federal Rule of Evidence 403 states that "unfair prejudice" within the meaning of the Rule means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

[10] In the first trial of this case, which resulted in a hung jury, the District Court admitted the Miller stipulations on his own motion

such a course of cross-examination would "emasculate and indeed gut the constitutional protection afforded under the *Noerr-Pennington* doctrine and have a 'chilling effect' on the exercise of First Amendment rights." (A119). To have ruled otherwise would have been in effect to permit a litigant to force the admission of evidence of protected activity at will, regardless of its potential prejudicial effect.[11]

C. There Is No Issue Here Relative To A "Sham" Proceeding.

The suggestion by Petitioner that this case presents a real issue as to whether one lawsuit can be a "sham proceeding" is a red herring. It has never been clear to us why the City raised this claim at all. In the District

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because a CEI witness had volunteered, on direct examination, testimony inconsistent with them. Curiously, counsel for neither the Petitioner nor Respondent realized that the "triggering" of the Miller stipulations had occurred until the District Court announced it.

[11] By the same token, Petitioner's suggestion of "an apparent conflict of the Circuits on this issue" (Petition at 21) is without substance. Petitioner simply juxtaposes cases in which courts have found that the prejudicial effect of admitting particular evidence of First Amendment-protected activity outweighed the probative value of such evidence against cases in which courts—in totally different factual contexts—admitted evidence of First Amendment-protected activity. This simply demonstrates that in applying the same legal standard in different circumstances, different courts appropriately reach different results as to the admissibility of different evidence of First Amendment-protected activity. The cases reflect no conflict as to the appropriate legal test to be employed in this regard. Indeed, one of the cases which Petitioner lists on the "wrong" side of the "conflict," *Feminist Womens' Health Center v. Mohammed*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), is cited approvingly in cases which Petitioner would place on the other side of the "conflict," *i.e.*, *Alexander v. Nat'l Farmers' Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982); *MCI Communications v. American Tel. and Tel.*, 708 F.2d 1081, 1160 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234 (1983).

Court's Order of August 3, 1981 (A107), it is correctly said:

> "In the instant action, however, the City advances no contention that the defendant's described conduct as stipulated in Stipulations Nos. 227 through 241 and the profferred bond issue testimony is actionable under the Sherman Antitrust Act. Indeed, the City in its supporting brief filed with its present motion candidly concedes that it 'does not ground Sherman Act liability upon CEI's conduct with respect to the Miller suit or the $9.8 million bond issue.' This acknowledgment is entirely consistent with Plaintiff's previous representations. Thus, in the City's brief of September 18, 1980, plaintiff clearly stated that it 'has not alleged this CEI-sponsored taxpayer suit as a violation of the Sherman Act and does not seek to predicate damages upon the suit.' *Id.* at 3. Similarly, in the plaintiff's brief of September 18, 1980, plaintiff acknowledged that it 'is not basing a claim for relief upon the efforts undertaken by CEI to prevent the City from obtaining a vitally needed capital for MELP.' *Id.* at 1."

Petitioner made an argument in the Court of Appeals that the Miller lawsuit was "sham litigation," but only claimed that the trial court's refusal to find it was sham litigation "deprived the jury of evidence of CEI's intent." But, of course, if it were sham litigation it would have been admissible as substantive evidence of an antitrust violation under this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). It was never offered for this purpose. The "sham" claim has no relevance to the question of whether the Court abused its discretion in finding that the admission of the stipulations as evidence of intent would be unduly prejudicial.

In any event, it seems clear that it was not sham litigation. The relief sought in the action was granted in substantial part. *See* Stipulation 239, Petition at A71.

Moreover, there were no procedural infirmaties under state law. This is a non-issue.

CONCLUSION

The consideration given by the District Court to the issues raised in the Petition, as well as the many other issues which arose before and during the two lengthy trials, was unusually careful. Most of the orders issued by the Court are reported at 538 F. Supp. 1227 to 1354. Due in part to this careful and thoughtful consideration, the trial of this complicated and long drawn out proceeding was singularly free of error.[12] At bottom, all that is involved here is the exercise of discretion, by an experienced trial judge, relative to the admissibility of evidence. There is no issue warranting the issuance of a writ of certiorari.

Respectfully submitted,

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[12] Various aspects of this case have been vainly appealed by the City to the Sixth Circuit three times before and this Court has twice before denied certiorari. (*See* Petition at A2, n.1).